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MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

OCT -8 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MICHAEL S.,)	2 CA-JV 2010-0070
)	DEPARTMENT A
Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
ARIZONA DEPARTMENT OF ECONOMIC)	Appellate Procedure
SECURITY, RAHSAAD S., and)	
RAHZHON S.,)	
)	
Appellees.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J186917

Honorable Kathleen A. Quigley, Judge Pro Tempore

AFFIRMED

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B R A M M E R, Presiding Judge.

¶1 In an order entered on June 17, 2010, the juvenile court terminated the parental rights of appellant Michael S. to his sons, Rahsaad S., then twelve years old, and Rahzhon S., then three. After a contested hearing, the court found the termination of Michael's rights warranted on two statutory grounds: the length of the prison sentences Michael will have been serving continuously from 2006 until 2011, depriving the children of a normal home for at least that long, *see* A.R.S. § 8-533(B)(4), and abandonment, *see* § 8-533(B)(1).

¶2 Michael raises three issues on appeal. First, he contends the juvenile court erred in permitting the Arizona Department of Economic Security (ADES) to amend the motion for termination during trial to allege abandonment pursuant to § 8-533(B)(1) as an additional statutory ground for termination. Second, he asserts the evidence did not support the court's finding that terminating his parental rights was in the best interests of the children. And, third, he claims ADES denied him substantive due process by failing to arrange for the children to visit with him while he was still incarcerated in Arizona, before his transfer to the custody of Ohio authorities in November 2009.

¶3 To terminate parental rights, a juvenile court must find the existence of at least one of the statutory grounds for termination enumerated in A.R.S. § 8-533(B) and "shall also consider the best interests of the child." *Id.* Although statutory grounds for termination must be proven by clear and convincing evidence, only a preponderance of the evidence is required to establish that severance will serve the child's best interests. *See* A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). We will affirm an order terminating parental rights unless we must

say as a matter of law that no reasonable person could find the essential elements proven by the applicable evidentiary standard. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 9, 210 P.3d 1263, 1265-66 (App. 2009). We view the evidence in the light most favorable to upholding the court's order. *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, ¶ 2, 181 P.3d 1126, 1128 (App. 2008).

¶4 Michael was incarcerated in Ohio when the boys were removed from their mother's custody in May 2008. Rahsaad and Rahzhon were adjudicated dependent as to their father in August 2008 after Michael admitted the allegations of an amended dependency petition. The boys' parents had never married, and Michael's paternity was not confirmed until November 2009, after the juvenile court had ordered him to submit to genetic testing.

¶5 Testifying at the contested termination hearing, Michael conceded he had no existing relationship with either of his sons. He had "[h]ardly ever" seen then-eleven-year-old Rahsaad; he had not helped raise him because, Michael said, the mother "never brought him around"; and he had never supported the child financially. Michael had seen his younger son exactly once, when someone had taken Rahzhon to visit Michael in jail in Ohio. The case manager testified Michael had written one letter to the children during the pendency of these proceedings; when she presented it to Rahsaad, the child "was confused" and "wasn't quite sure who his dad was."

¶6 With respect to Michael's contention that the juvenile court erroneously permitted ADES to amend the motion for termination to add abandonment as a second ground for severance, we need not address the issue. Although we can discern neither

surprise nor prejudice to Michael occasioned by the amendment, any alleged error in the juvenile court's decision to permit the amendment would have been harmless in any event because abandonment was only one of the two statutory grounds on which the court found termination warranted. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 27, 995 P.2d 682, 687 (2000) (proof of any one ground will support severance of parental rights).

¶7 Michael's second contention, that ADES failed to show by a preponderance of the evidence that terminating his rights was in the children's best interests, rests on his assertion that ADES was required to prove the children were adoptable. Even were we to agree with *In re Maricopa County Juv. Action No. JS 500274*, 167 Ariz. 1, 804 P. 2d 730 (1990), he still would not prevail.

¶8 The case manager testified that these children are adoptable and that ADES had identified a potential adoptive placement for them in Ohio with a relative of one of the parents. At the time of the termination hearing, ADES was awaiting the results of a home study on that relative. But, regardless of that fact, neither statute nor case law provides that a juvenile court in Arizona may terminate the rights of parents only if the child or children are adoptable. And the juvenile court's written ruling adequately addresses the evidentiary basis for its finding that the best interests of these children will be served by terminating Michael's parental rights, and we need not address the issue further.

¶9 Finally, Michael argues that ADES denied him due process of law by failing to make a good-faith effort to preserve the family by providing him visitation with

his children in prison between February 2009, when the juvenile court granted ADES discretion to facilitate such visits, and November 24, 2009, when Michael completed his Arizona sentence and was transferred to Ohio to serve other sentences there. As ADES observes, although the court had authorized ADES to facilitate a prison visit between Michael and the children, ADES was unwilling to do so until Michael's paternity had been established conclusively. That did not occur until November 23, 2009, the day before he left Arizona for Ohio.

¶10 Because Michael had no existing relationship with these children and neither of them knew him, affording him visitation with them would not have served the purpose of preserving his relationship with the children but, rather, of attempting to create a relationship that Michael previously had not established, even when he was not in prison. We would be hard pressed to find a denial of due process under these particular circumstances. ADES had no duty to offer Michael reunification services before seeking to terminate his parental rights based on the length of his prison terms, *James H. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 1, ¶ 1, 106 P.3d 327, 327 (App. 2005), "because prolonged incarceration is [not] something [that can be] ameliorate[d] through reunification services." *Id.* ¶ 9. Nor are rehabilitative services required when termination is sought on the ground of abandonment. *Bobby G. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 506, ¶ 11, 200 P.3d 1003, 1007 (App. 2008).

¶11 For the reasons stated, we find no merit to the issues raised on appeal. The record amply supports the juvenile court's findings that statutory grounds for termination

exist and that severance is in the children's best interests. We therefore affirm its order of June 17, 2010, terminating Michael's parental rights to Rahsaad and Razhon.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge